82-1214

No.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1982

LUISA LEHNER,
Petitioner,

VS.

UNITED STATES OF AMERICA,
SAMUEL RILEY PIERCE, Secretary of the
Department of Housing and Urban Development,
HOUSE OF AFFIRMATION, INC., a corporation,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Does the Fifth Amendment to the United States Constitution protect a mortgagor from loss of property by the Federal Government's use of a state nonjudicial foreclosure procedure?

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CITATIONS

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LUISA LEHNER, Petitioner,

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UNITED STATES OF AMERICA, SAMUEL RILEY, Secretary of the Department of Housing and Urban Development, HOUSE OF AFFIRMATION, INC., a corporation, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The petitioner Luisa Lehner respectfully prays that a writ of certiorari issue to review that judgment and opinion of the Ninth Circuit entered in this proceeding on October 20, 1982.

OPINION BELOW

The opinion of the Court of Appeals,

not yet reported, appears in the Appendix hereto. No opinion was rendered by the District Court for the Northern District of California.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on September 3, 1982. A timely petition for rehearing en banc was denied on October 20, 1982, and this petition for certiorari was filed within ninety (90) days of that date. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Does the Fifth Amendment to the United States Constitution protect a mortgagor from loss of property by the Federal Government's use of a state nonjudicial foreclosure procedure?

CONSTITUTIONAL PROVISIONS INVOLVED

"No person shall . . . be deprived of . . . property, without due process of

law." United States Constitution, Amendment Five.

STATUTORY PROVISIONS INVOLVED

California Civil Code §2924, et seq. (Pursuant to Rule 23(1)(d), said statutory provisions are included in the Appendix.)

STATEMENT OF THE CASE

The jurisdiction of the District Court was invoked under the provisions of the Fifth Amendment of the United States Constitution; 28 U.S.C. 1331, federal question jurisdiction, 28 U.S.C. 1346(a)(2), 1346(b), 1346(f), United States as a defendant; 28 U.S.C. 2201, 2202, Declaratory and Further Relief; 28 U.S.C. 2671, et seq., Federal Tort Claims Act; 28 U.S.C. 2409a, Quiet Title; and Rule 65 of the Federal Rules of Civil Procedure, Injunctions.

This case involves a nursing home construction project which was federally insured. On September 21, 1976, plaintiff-

appellant, Luisa Lehner, filed a complaint for a temporary restraining order to enjoin the government from selling the nursing home known as Coastside Convalescent Hospital, Montara, California, to the House of Affirmation, restitution of the property to her and damages. The Coastside Convalescent Hospital at that time was a limited partnership with Mrs. Lehner as general partner. The court did not grant the injunctive relief. On June 15, 1978, appellant filed a First Amended Complaint which was dismissed by the Court, the Honorable R. H. Schnacke, judge, with leave to amend. On August 1, 1978, appellant filed a Second Amended Complaint, seeking Restitution, Declaratory and Injunctive Relief and damages against Carla Hills, Secretary of the Department of Housing and Urban Development, various officials of H.U.D., Fred Soviero, the inspector on the project, and the House

of Affirmation.

The federal defendants moved to substitute Patricia Harris for Carla Hills, dismissal of the federal defendants, dismissal of the Secretary, and dismissal of the case. The House of Affirmation made motions to dismiss, to strike and for a more definite statement. On April 16, 1979, the court: ordered the substitution; dismissed the other federal defendants; dismissed the breach of contract claims on the grounds that that matter should be heard by the Court of Claims, ordered the United States be made a defendant and ordered appellant to file amendment to the Second Amended Complaint. On May 16, 1979, appellant filed the amendment to the Second Amended Complaint.

In the complaint, the First Amended Complaint, the Second Amended Complaint and the Amendment to the Second Amended Complaint, petitioner raised the question

of nonjudicial foreclosure by the federal government. For example, the third cause of action of the original complaint states in pertinent part:

> That siad (sic) nonjudicial foreclosure and the pending sale are in violation of Plaintiff's constitutional right to due process of law under the 5th amendment to the constitution of the United States in that Plaintiff's property was taken without adequate notice of her rights, without adequate opportunity to be represented by competant (sic) counsel and without a hearing.

The eighth cause of action of the Amendment to the Second Amended Complaint is entitled "Violation Of 5th Amendment" and states in pertinent part:

> 47. At no time before her property was taken did plaintiff receive proper notice of the Default & Foreclosure, nor was plaintiff given an opportunity to demonstrate HUD's responsibility for the default and foreclosure before an impartial judicial authority.
>
> 48. Said nonjudicial foreclosure and the sale were in violation of plaintiff's consti-

> tutional right to due process of law under the 5th Amendment to the Constitution of the United States in that plaintiff's property was taken without adequate notice of her rights, without adequate opportunity to be represented by competent counsel, and without a hearing.

Motions to dismiss were filed by all defendants and the House of Affirmation filed a motion to strike. On November 23, 1979, the court dismissed most causes of action, dismissed the United States, substituted Moon Landrieu for Patricia Harris, and ordered defendants to answer.

The remaining defendants filed motions for summary judgment. On April 25, 1980, the court granted the motions for summary judgment, ordered the case dismissed and assessed costs against appellant.

The Court of Appeals for the Ninth Circuit affirmed the judgment of the District Court stating in pertinent part:

> Because Lehner does not dispute that the procedure prescribed by California law provides mini-

> mal due process, we need not evaluate its constitutionality.
>
> Her sole challenge is to the Government's alleged failure to notify her formally of the foreclosure sale. (Footnotes omitted)
>
> Ct of Appeals Opinion, page 5, line 32 to page 6, line 5.

Petitioner sought rehearing in the Court of Appeals based upon: (a) the fact that throughout the pendency of the litigation, all parties understood that petitioner was mounting a direct challenge to the use of the state nonjudicial foreclosure process by the United States; (b) Section 9 of Appellant's Brief in the Court of Appeals is entitled "Does The Fifth Amendment Protect A Mortgagor From Nonjudicial Foreclosure By The Federal Government?"; and (c) oral argument before the Court of Appeals specifically concentrated on the issue of nonjudicial foreclosure by the Federal Government.

The Petition For Rehearing was denied on October 20, 1982.

On or about February 2, 1971, Coastside entered into agreements with FHA and Bankers Mortgage Company of California (hereinafter referred to as Bankers Mortgage). Under said agreements, certain improvements and additions to the nursing home facility known as Coastside Convalescent Hospital, which was located on certain real property in Montara, California, were to be financed by a construction loan extended by Bankers Mortgage. Repayment of said loan was guaranteed by FHA under provisions of the National Housing Act, as Project Number 121-43067-PM. Pursuant to said agreement, Coastside executed a deed of trust conveying the real property in trust as security for repayment of said construction loan. Under said agreement, and under statutes and regulations applicable thereto, FHA was

responsible for regular inspection of the construction work as it was performed, to insure that all work by the construction contractor was performed in a proper and timely manner.

Fred Soviero was, at the time of the action complained of herein, an employee of FHA, whose duties included inspection and supervision of the quality and progress of the construction work financed by the loan above-described.

On or about January 18, 1972, Soviero induced petitioner to execute, on behalf of Coastside, a Notice of Completion declaring that the construction work, for which the herein described loan had been obtained, had been satisfactorily completed. In fact, said work had not been satisfactorily completed and there remained substantial construction defects, which fact was known to Soviero. Soviero induced petitioner to execute said Notice

of Completion by representing that the construction contractor, Roberts-Pacific, Inc., did not have sufficient funds to complete the job; that if the contractor did not procure funds, it would abandon the job; that petitioner's execution of a Notice of Completion would result in the release to the contractor of substantial funds being held in escrow pending the completion of the project; that if such funds were released, the contractor would complete the project, including correction of all construction defects; and that if petitioner signed the Notice of Completion, FHA would closely supervise the contractor and his work, and effectively require him to complete the project and to cure all construction defects.

In spite of the representations and promises of Soviero, described above, the FHA did not effectively require the construction contractor to complete the

project and to cure all defects and shortly after the execution of the Notice of Completion, the contractor falsely claiming that the project had been completed abandoned the job.

Because of the construction defects which remained after the contractor had abandoned the job, Coastside was unable to secure appropriate licenses and permits from state and local agencies to enable it, either directly or through a lessee, to reopen Coastside. In consequence thereof, Coastside did not receive the income which would otherwise have enabled it to make payments on the construction loan as they fell due, and said payments were not made.

As a result of Coastside's inability to make loan payments as they fell due, FHA was required, in its capacity of guarantor, to pay the loan balance to Bankers Mortgage; upon said payment, Bankers Mortgage conveyed its right, title and

interest in the real property, including its interest as beneficiary under the deed of trust, to FHA. In purported exercise of the power of sale in the deed of trust, the real property was thereafter deeded to the Secretary Of Housing And Urban Development, who thereafter deeded it to respondent House Of Affirmation, Inc. House Of Affirmation, Inc., is presently in possession of and claims title to the real property. It had constructive notice of petitioner's claims herein, in that petitioner timely recorded with the Recorder of the County of San Mateo a lis pendens giving notice of this lawsuit.

For a period of more than three years, ending only with the original filing of this action and the sale of the real property to House of Affirmation, Inc., petitioner made repeated attempts, alone and with others, to reach an informal settlement with FHA and with the Department

of Housing and Urban Development, which would have resulted in the return to petitioner of title and possession of the real property, and reinstatement, on reasonable terms, of the construction loan. Numerous agreements were reached and promises made by officials of FHA and HUD, as described below, which would have resulted in such settlement, but such promises either were not kept or were not implemented by officials subordinate to those who made the promises.

In December of 1973, petitioner and Ms. Jerplen Keys contacted the HUD Loan Management Division in Washington, D.C., and spoke with an official there. Petitioner is not certain of the official's name, but believes it to have been Anthony Julio. They discussed a proposal under which the property would be restored to petitioner who would in turn lease it to Ms. Keys. Ms. Keys indicated that the

construction defects would have to be cured so that the necessary licenses and permits could be obtained for her to enter into such a lease. The official stated that they should not worry about foreclosure and promised that he would contract FHA management in San Francisco and see that they insisted on the contractor curing the construction defects. They then spoke with Mr. Benson of the FHA Regional Office in San Francisco, who acknowledged receipt of such a call from Washington, and who promised that FHA would enforce completion of the construction contract, whether by the same contractor or by a different contractor. In reliance on these promises, Ms. Keys deposited Twenty Thousand Dollars ($20,000.00) with FHA as a deposit and as an initial payment for reinstatement of the loan. In spite of these promises, FHA never acted to secure completion of the project and after several months, the

deposit was returned to Ms. Keys.

In August of 1974, petitioner accompanied by her attorney, met with Mr. Benson and with Mr. Ohler of the FHA Regional Counsel's Office. They discussed petitioner's claims in the matter and further discussed her feeling that if the construction defects were corrected, she would be able to obtain permits that would put Coastside on a paying basis and reasonably permit reinstatement of the loan. Petitioner proposed that a contractor she had secured go onto the property and make the necessary repairs. She was told that FHA could not permit this because it would result in title to the real property being clouded by mechanic's liens. Petitioner indicated that the contractor was willing to waive any lien claims, and Mr. Benson replied that in that case the contractor would be permitted to enter the property and do the necessary work. They

also discussed the fact that the loss was caused by petitioner's reliance on the unkept promises of Soviero and the inducement to sign the Notice of Completion. Mr. Benson stated that if Soviero had in fact made such promises, FHA would negotiate a reasonable settlement under which the losses caused by the construction defects would be shared between the petitioner and FHA. After this conversation, petitioner's attorney drafted a lien waiver which was approved as to form by Mr. Ohler, executed by the contractor and delivered to the FHA office. In spite of this, FHA refused to allow the contractor to enter the property and perform the necessary work.

None of these agreements were honored. In addition, petitioner assigned various Medi-Cal claims to HUD in an effort to meet her obligations. HUD never processed these claims.

Petitioner met with Mr. Benson of HUD

on or about August 29, 1974, to stop foreclosure.

On or about September 4, 1974, Mr. R. G. Litolff of the Loan Management Branch of HUD demanded a check for $50,000 to cover the delinquency, and a letter from the State.

On September 25, 1974, petitioner's attorney requested delay of foreclosure proceedings. Despite this request, and despite the responsibility of the United States of America for the delinquency and incomplete construction, defendant United States of America, through Erwin Farley, Director of Housing Management, sent petitioner a letter on or about October 9, 1974, denying the request to forebear foreclosure proceedings.

On or about July 25, 1975, petitioner sent Mr. Alan Smith, HUD's Regional Inspector General, a letter requesting

reinstatement as owner and operator of Coastside.

On September 16, 1976, Mr. Gary, petitioner's attorney, sent a letter to Mr. Harman of the Regional Administration for Housing Management, requesting that the sale be continued for sixty (60) days or in the alternative, that the offer to sell be set aside. Mr. Gary particularly objected to the conduct of Soviero and HUD, vis-a-vis, petitioner herein.

On September 21, 1976, petitioner filed the action herein to enjoin the sale.

On November 17, 1976, petitioner's attorney sought to stop the sale by letter to Mr. Joseph Hamblin, Area Counsel for HUD.

There were other efforts by petitioner as well. Petitioner's records are incomplete. However, defendants should have complete records of the many letters, phone calls, meetings and negotiations

with petitioner. All efforts eventually proved to be unsuccessful though petitioner did reach agreements with Mr. Benson and Mr. Ohler, which are described above. These agreements were subsequently violated.

The Notices of Default and Foreclosure were not received by petitioner because they were mailed to the wrong address.

At no time before her property was taken did petitioner receive proper notice of the Default and Foreclosure, nor was petitioner given an opportunity to demonstrate HUD's responsibility for the default and foreclosure before an impartial judicial authority.

Petitioner's property was taken by the government through nonjudicial foreclosure. Although the Department Of Housing evaluated the property at $372,300 when the original mortgage was approved, the government gave the property to the House of Affirmation for $165,000.

REASONS FOR GRANTING THE WRIT

I. DOES THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION PROTECT A MORTGAGOR FROM LOSS OF PROPERTY BY THE FEDERAL GOVERNMENT'S USE OF A STATE NONJUDICIAL FORECLOSURE PROCEDURE?

Petitioner believes that this case squarely presents the issue of whether the Federal Government is entitled to use a state nonjudicial foreclosure scheme to protect its interest in a federally insured loan program. Clearly, resolution of this issue effects not only petitioner, but others who face loss of their property by foreclosure from the Federal Government.

While the Court of Appeals in the instant case did not address the issue herein presented, a number of courts have discussed the issue with differing and conflicting results. Brown v. Lynn, 394 F. Supp. 986 (N. D. Ill. 1974); Hoffman v. United States Department of Housing and Urban Development, 519 F.2d 1160 (5th Cir.

1975); United States v. White, 543 F.2d 1139 (5th Cir. 1976); and Ricker v. United States, 417 F. Supp. 133 (D. C. Me. 1976). Each of the decisions in the above-cited cases, is based in part upon this Court's decision in Goldberg v. Kelly, 397 U.S. 254, 90 S. Ct. 1011, 25 L. Ed.2d 287 (1969) and its progeny which established the concept of procedural due process whenever the government seeks to deprive a citizen of a statutorily granted property right. The Goldberg v. Kelly, supra, held that before a welfare recipient's benefits are terminated notice and a hearing are required. This due process requirement of notice and hearing has been held by this Court to apply to garnishing of wages; Sniadach v. Family Finance Corporation, 395 U.S. 337, 89 S. Ct. 1820, 23 L. Ed.2d 349 (1969); revocation of a driver's license, Bell v. Burson, 402 U.S. 535, 91 S. Ct. 1586, 29 L. Ed.2d 90 (1971);

repossession of consumer goods, Fuentes v. Shevin, 407 U.S. 67, 92 S. Ct. 1983, 32 L. Ed.2d 556 (1972); and tenure of a college professor discharged by a public educational institution, Board of Regents v. Roth, 408 U.S. 564, 92 S. Ct. 2701, 33 L. Ed.2d 548 (1972) and Perry v. Sindermann, 408 U.S. 495, 92 S. Ct. 2694, 33 L. Ed.2d 570 (1972).

Both Brown v. Lynn, supra, and Hoffman v. United States Department of Housing and Urban Development, supra, found reasons why the decision in Goldberg v. Kelly, supra, need not apply. In Brown, the Court held that there was no threatened injury or loss. 394 F. Supp. at 996. In Hoffman, the Court assumed that due process "would also require the Federal Government to give homeowners notice and opportunity to be heard before foreclosing their home", but found that defendants waived their right to be heard. 519 F.2d

at 1165. The instant case involves neither waiver nor absence of loss.

Petitioner believes that she is entitled not only to the same safeguards granted those persons deprived of statutorily created property rights, but also to the property rights envisioned by the Founding Fathers in drafting and adopting the Bill Of Rights. The taking of an individual's real property without due process of law, without a full hearing, is the type of action which the Founding Fathers sought to prevent. This concept is clearly understood by the Court in Ricker v. United States, supra, wherein it held,

> It cannot be doubted that the Rickers were "deprived of . . . property without due process of law" in violation of the Fifth Amendment. First, the foreclosure and sale were initiated and carried out by federal employees acting on behalf of federal government. 417 F. Supp. at 138.

Furthermore, the Supreme Court of the State of California also recognized the difference between foreclosure by a private individual and foreclosure by a government entity. Garfinkle v. Superior Court, 21 C.3d 268 (1978). The Court in the Garfinkle case found that there was insufficient state action to trigger due process requirements when a private individual invoked the California nonjudicial foreclosure procedure against another private individual. However, the Court specifically stated ". . . the due process clause of the Fifth Amendment to the Federal Constitution, applie(s) to the state, not private action. . .", at p. 282. Clearly, the Garfinkle Court would not have allowed the State of California to utilize the nonjudicial foreclosure procedure against a private individual. In the instant case, the United States of America, for its own purposes, using its

own agents, seized property under the California nonjudicial foreclosure procedure. Clearly, the United States of America is not a lesser governmental body than the State of California.

The importance of a hearing is emphasized in this particular case. Petitioner and her attorneys repeatedly tried to obtain a hearing with the federal officials and with the Court, but they were unable to do so. Had the government been required to institute foreclosure proceedings in court, rather than taking the nonjudicial route, any number of things may have happened. In light of the facts set forth above, the government would have a tough time demonstrating that it had "clean hands." A judge doing equity may have done any number of things, including requiring the government to complete the construction, requiring the government to force the contractor to complete the

construction, allowing petitioner more time to pay off the debt, requiring the government to allow petitioner to lease the property, altering the payment schedule and amount, granting foreclosure, or any other thing which the court sitting in equity could do.

Federally insured loans are designed to facilitate the accomplishment of specific governmental purposes. Nowhere can it be shown that Congress intended said programs to be used as a vehicle to facilitate government acquisition of private property. Nor can it be shown that Congress ever intended that federally insured loans be used as an excuse for avoiding the mandates of the Fifth Amendment.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgment

and opinion of the Ninth Circuit.

Dated: January 17, 1983

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

LUISA LEHNER, NO. 80-4326

Plaintiff-Appellant, DC NO. C76-2028

v.

UNITED STATES OF AMERICA, SAMUEL RILEY PIERCE,* Secretary of the Department of Housing and Urban Development, HOUSE OF AFFIRMATION, INC., a corporation, OPINION

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of California
Robert H. Schnacke, District Judge, Presiding,
Argued and Submitted December 16, 1981

Before: MERRILL, Senior Circuit Judge, and CHOY and WALLACE, Circuit Judges

CHOY, Circuit Judge:

The district court dismissed Luisa Lehner's numerous claims against the

*Pursuant to Rule 43(c), Samuel Riley Pierce is substituted for Patricia Harris as secretary of the Department of Housing and Urban Development.

United States and the Secretary of Housing and Urban Development, and her single claim against the House of Affirmation, Inc. We affirm the dismissal of some of her claims for lack of jurisdiction and the remainder for failure to state claims upon which relief can be granted.

I. Facts

Lehner asserts that governmental misconduct resulted in the foreclosure and resale of realty located in California and owned by Coastside Convalescent Hospital, a limited partnership in which she was the sole genreal partner and to which she is the successor-in-interest. She alleges the following facts.

In early 1971, the Federal Housing Administration (FHA) guaranteed a loan from Bankers Mortgage Company of California to Coastside to renovate the hospital. Coastside executed a deed of trust to Bankers Mortgage as security for the loan

and authorized the FHA to periodically inspect construction.

In early 1972, the construction contractor ran out of money. Fred Soviero, the FHA employee assigned to the project, told Lehner that if she executed a notice stating that the project had been substantially completed, the contractor could procure the money needed from funds held in escrow pending completion. Relying on assurances from Soviero that the FHA would see to the project's completion, Lehner executed the notice. The contractor, claiming no further obligation to work, abandoned the unfinished project. As a result, Coastside did not realize the income expected from the reopening of the hospital.

When Coastside failed to make loan payments as they fell due, the FHA fulfilled its duty as guarantor and paid Bankers Mortgage the balance. In return,

Bankers Mortgage conveyed its interest in the realty to the FHA. Throughout the next three years, Lehner made repeated attempts, by herself and through an attorney, to negotiate a settlement with FHA and its parent organization, the Department of Housing and Urban Development (HUD). Several oral agreements were made but not reduced to writing. HUD failed to honor the informal settlements.

In September 1976,[1/] HUD held a foreclosure sale at which the House of Affirmation purchased the property for an amount well below its alleged market value of $500,000. Lehner had known that the sale was imminent. In fact, her attorney had requested that HUD delay it on two occasions; the second request coming just a few days prior to the sale. Also, on the very day that the House of Affirmation contracted to buy the property, Lehner brought suit in federal district court to

secure a temporary retraining order against the sale.

II. Jurisdiction

The doctrine of sovereign immunity foreclosed the district court from entertaining all of Lehner's tort claims as well as the monetary prayer in her contract claims against the United States. As the Supreme Court has explained: "The United States, as sovereign, is immune from suit save as it consents to be sued, and the terms of consent to be sued in any court defines the court's jurisdiction to entertain the suit." United States v. Sherwood, 312, U.S. 584, 586 (1941)(citations omitted).[2/] The claims fail to clear this jurisdictional hurdle because Lehner failed to satisfy the conditions imposed by the United States on its waiver of immunity.

The Federal Tort Claims Act, 28 U.S.C. §§ 2671-80, waives federal sovereign immunity from tort claims brought in

federal district court. House v. Mine Safety Appliances Co., 573 F.2d 609, 613 (9th Cir.), cert. denied, 439 U.S. 862 (1978); Caidin v. United States, 564 F.2d 284, 286 (9th Cir. 1977). A condition limiting the waiver is that "the claimant shall have first presented the claim to the appropriate Federal agency." 28 U.S.C. §2675(a). The claim must be in the form of some "written notification of an incident, accompanied by a claim for money damages in a sum certain." 28 C.F.R. §14.2(a) (1980). See House v. Mine Safety Appliances Co., 573 F.2d at 615; Caton v. United States, 495 F.2d 635, 637-38 (9th Cir. 1974); Avril v. United States, 461 F.2d 1090, 1091 (9th Cir. 1972). When the claimant sues in district court, it cannot seek "any sum in excess of the amount of the claim presented to the federal agency, except where the increased amount is based upon newly discovered evidence not reason-

ably discoverable at the time of presenting the claim to the federal agency, or upon allegation and proof of intervening facts, relating to the amount of the claim." 28 U.S.C. §2675(b). Lehner failed to follow the prescribed procedures. She never filed a written claim or requested a monetary settlement with the FHA or HUD. Her informal discussions with the agency officials certainly do not supply an adequate basis for bringing tort claims for $500,000 in district court.

Similarly, while the United States has waived immunity from contract claims, a claim seeking an amount in excess of $10,000 must be presented to the Court of Claims. 28 U.S.C. §§1346(a)(2), 1491. See Rowe v. United States, 633 F.2d 799, 800-01 (9th Cir. 1980), cert. denied, 451 U.S. 970 (1981). The district court therefore lacks jurisdiction to award Lehner the $500,000 sought to compensate

her for the FHA's alleged breach of contract.

This leaves three types of claims that clear the jurisdictional hurdle. First, Lehner alleges that the Government violated her right to due process by taking the property without adequate notice. The court had jurisdiction at least over her prayer for equitable relief. See Glines v. Wade, 586 F.2d 675, 681 (9th Cir. 1978), rev'd on other grounds sub nom. Brown v. Glines, 440 U.S. 957 (1980). It is uncertain whether jurisdiction also exists over the prayer for money damages. In Beller v. Middendorf, 632 F.2d 788, 797-98 & n.5 (9th Cir. 1980), we reflected upon whether sovereign immunity ever protects the Government from liability for the unconstitutional acts of its agents. As in Beller, we need not resolve the issue here. Lehner's nonmonetary prayer requires us to reach the due process claim and, for the reasons

given below, the claim fails. Since the outcome would be the same whether or not jurisdiction exists over the monetary prayer, we decline to decide how the doctrine of sovereign immunity might affect constitutional claims. Cf. Norton v. Matthews, 427 U.S. 524, 532 (1976) (avoiding difficult jurisdictional question and reaching substantive question).

The district court also had jurisdiction over the prayer in her contract claims that the FHA return to her the property sold to the House of Affirmation. As we have explained: "The Administrative Procedures Act (APA) provides for judicial review of agency action and a waiver of sovereign immunity in an action for relief other than money damages that states a claim that a federal agency or officer failed to act as required in his official capacity. 5 U.S.C. §702." Rowe v. United States, 633 F.2d at 801 (footnotes omitted).

When coupled with the grant of jurisdiction in 28 U.S.C. §1331, the APA paved the way for the district court to entertain her equitable prayer. Id.

Finally, the doctrine of sovereign immunity does not affect Lehner's claim against the House of Affirmation (a private corporation). We see no other barrier to jurisdiction over it.

III. Failure to State a Claim

Although these three claims clear the jurisdictional hurdle, we uphold their dismissal under Fed. R. Civ. P. 12(b)(6). In each instance, Lehner has failed to allege facts which, if proven, would entitle her to relief. See Conley v. Gibson, 355 U.S. 41, 45 (1957). While the district court dismissed all three for lack of jurisdiction, we may affirm its judgment on any ground squarely presented in the record.

A. Due Process Claim

The State of California has establish-

ed a procedure whereby a mortgagee can hold a foreclosure sale without judicial intervention. See Cal. Civil Code §2924 et seq. When the Government acts as mortgagee,[3/] clearly the mortgagor has a right to notice and a hearing prior to the sale. See Harris v. City of Roseburg, 664 F.2d 1121, 1125 (9th Cir. 1981) (relying on Sniadach v. Family Finance Corp. of Bay View, 395 U.S. 337 (1969), and Fuentes v. Shevin, 407 U.S. 67 (1972)). Because Lehner does not dispute that the procedure prescribed by California law provides minimal due process, we need not evaluate its constitutionality.[4/]

Her sole challenge is to the Government's alleged failure to notify her formally of the foreclosure sale.[5/] She alleges that the Government mailed the notice to the wrong address. Although we cannot determine whether her allegation is true, the record reveals clearly that she

knew the foreclosure sale was imminent. Her repeated efforts to delay the impending sale attest to her knowledge. It is apparent that government officials informed her about the sale during their repeated conversations with Lehner and her lawyer. She makes no suggestion that the written notice would have supplied information not already known to her or that it would somehow facilitate judicial review of her claims, nor did she allege that she never received actual notice of the foreclosure sale. Her constitutional argument thus boils down to due process requiring the meaningless formality of written (rather than oral) notice.

We refuse to elevate form over substance. "[D]ue process is flexible and calls for such procedural protections as the particular situation demands." Morrissey v. Brewer, 408 U.S. 471, 481 (1972). See Cafeteria & Restaurant

Workers Union, Local 473 v. McElroy, 367 U.S. 886, 895 (1961); Goichman v. Rheuban Motors, Inc., No. 80-5966, slip op. at 2845 (9th Cir. July 2, 1982). Similarly, the Supreme Court has "called attention to the impossibility of setting up a rigid formula as to the kind of notice that must be given; notice required will vary with circumstances and conditions." Walker v. City of Hutchinson, 352 U.S. 112, 115 (1956). Notice should further the purposes of the requirement: "to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950). See Schroeder v. City of New York, 371 U.S. 208, 211 (1962) (quoting Mullane). Lehner does not dispute that the notice given her, whether oral or written, apprised her fully of the foreclosure sale and the options available to her. We therefore find it to

have been constitutionally adequate.

In other situations, written notice may best communicate the seriousness of the governmental action contemplated, facilitate judicial review of the legitimacy of the action, or accomplish some other legitimate goal. We do not decide whether written notice would then be constitutionally mandated. There is no general rule, however, requiring written rather than oral notice.

B. Other Claims

We can quickly dispose of the two remaining matters over which the district court had jurisdiction. First, on the basis of her contract claims, Lehner seeks the return of the property sold to the House of Affirmation at the foreclosure sale. She supplies no authority or sound rationale, however, for the proposition that a breach of contract can ever justify setting aside a foreclosure sale under

California law. See 3 Witkin, Summary of California Law, "Security Transactions in Real Property" §§109-10 (8th ed. 1973) (breach of contract not listed among the judicially-recognized reasons for overturning a foreclosure sale). We therefore hold that her equitable prayer fails as a matter of law.

The other claim is that the House of Affirmation paid an inordinately low amount for the property at the foreclosure sale and so the sale is void for lack of consideration. But Lehner alleges no fact suggesting that the House of Affirmation acted improperly; she simply says that the Government acted unfairly in setting the price. Because she offers no theory for liability absent some misconduct, her claim against the House of Affirmation must fail. To the extent that her claim is against the United States, it is barred by the doctrine of sovereign immunity.

AFFIRMED.

FOOTNOTES

1. [reference on page 2]

There is some disagreement over when the sale occurred. We assume the truth of the date alleged by Lehner.

2. [reference on page 3]

A plaintiff cannot avoid sovereign immunity by naming as the defendant an officer of the United States acting in an official capacity when in fact the claim is against the United States. Larson v. Domestic & Foreign Corp., 337 U.S. 682, 683-90 (1949); Hutchinson v. United States, 677 F.2d 1322, 1327 (9th Cir. 1982). The Secretary of HUD is such a nominal defendant here.

3. [reference on page 5]

Because the United States invoked California's nonjudicial foreclosure procedure, we need not reach the issue whether there is sufficient state action to trigger due-process protections when a private person invokes it.

4. [reference on page 6]

While we do not pass on the issue, California courts have suggested that the procedure satisfies due process. As stated in Strutt v. Ontario Savings & Loan Ass'n, 28 Cal. App.3d 866,877, 105 Cal. Rptr. 395, 402 (1972) (dictum):

> Under the provisions of Civil Code, section 2924, there is

> no immediate seizure of property nor any immediate impairment of the debtor's rights in respect to the property. He is given by the statute a minimum of 90 days in which he can refinance or sell the property or more to the point, if he disputes the facts set forth in the notice of default, or has some legal or equitable defense to foreclosure, he may within the statutory period institute an action to enjoin the sale and thereby obtain the judicial hearing contemplated by the cases cited.

See also Hoffman v. United States Department of Housing and Urban Development, 519 F.2d 1160, 1165-66 (5th Cir. 1975) (holding that mortgagee's request that mortgagor explain his failure to repay loan satisfies due process.

5. [reference on page 6]

A separate issue not properly before us is whether noncompliance with the statutory notice provisions voids the foreclosure sale under state or federal law. Lehner argues only that the failure to give written notice, whether or not required by statute, violates the fifth amendment.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

LUISA LEHNER, Plaintiff-Appellant, v. UNITED STATES OF AMERICA, SAMUEL RILEY PIERCE, Secretary of the Department of Housing and Development, HOUSE OF AFFIRMATION, INC. a corporation, Defendants-Appellees.	)	80-4326 ORDER

Before: MERRILL, Senior Circuit Judge, and CHOY and WALLACE, Circuit Judges.

The panel as constituted in the above case has voted to deny the petition for rehearing. The petition for rehearing is denied.

FILED
Oct 20 1982

APPENDIX C

CALIFORNIA CIVIL CODE §2924:

Every transfer of an interest in property, other than in trust, made only as security for the performance of another act, is to be deemed a mortgage, except when in the case of personal property it is accompanied by actual change of possession, in which case it is to be deemed a pledge. Where, by a mortgage created after July 27, 1917, of any estate in real property, other than an estate at will or for years, less than two, or in any transfer in trust made after July 27, 1917, of a like estate to secure the performance of an obligation, a power of sale is conferred upon the mortgagee, trustee, or any other person, to be exercised after a breach of the obligation for which such mortgage or transfer is a security, such power shall not be exercised except where such mortgage or transfer is made pursuant to an order, judgement, or decree of a court of record, or to secure the payment of bonds or other evidences of indebtedness authorized or permitted to be issued by the Commissioner of Corporations, or is made by a Public Utilities Act, until (a) the trustee, mortgagee, or beneficiary, shall first file for record, in the office of the recorder of each county wherein the mortgaged or trust property or some part of parcel thereof is situated, a notice of default, identifying the mortgage or deed of trust by stating the name or names of the trustor or trustors and giving the book and page where the same is recorded or a description of of the mortgaged or trust property and containing a statement that a breach of the obligation for which such mortgage or transfer

in trust is security has occurred, and setting forth the nature of such breach and of his election to sell or cause to be sold such property to satisfy the obligation, and where the default is curable pursuant to Section 2924c, containing the statement specified in paragraph (1) of subdivision (b) of Section 2924c; (b) not less than three months shall thereafter elapse; and (c) after the lapse of the three months the mortgagee trustee, or other person authorized to take the sale shall give notice of sale, stating the time and place thereof, in the manner and for a time not less than that set forth in Section 2924f. A recital in the deed executed pursuant to the power of sale of compliance with all requirements of law regarding the mailing of copies of notice or the publication of a copy of the notice of default or the personal delivery of the copy of the notice of default or the posting of copies of the notice of sale or the publication of a copy thereof shall constitute prima facie evidence of compliance with such requirements and conclusive evidence thereof in favor of bona fide purchasers and encumbrancers for value and without notice.

No. 82-1214

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1982

LUISA LEHNER,
Petitioner,

vs.

UNITED STATES OF AMERICA,
SAMUEL RILEY PIERCE, Secretary of the
Department of Housing and Urban Development,
HOUSE OF AFFIRMATION, INC., a corporation,
Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

BRIEF OF RESPONDENT HOUSE OF AFFIRMATION, INC. IN OPPOSITION

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QUESTION PRESENTED

On the facts of this case, did petitioner receive adequate notice and opportunity for a hearing under the Fifth Amendment prior to foreclosure on her business property by the Department of Housing and Urban Development?

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TABLE OF AUTHORITIES CITED

No. 82-1214

In the Supreme Court

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OCTOBER TERM, 1982

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF RESPONDENT HOUSE OF AFFIRMATION, INC. IN OPPOSITION

The respondent, House of Affirmation, Inc., respectfully requests that this Court deny the petition for a writ of certiorari seeking review of the opinion of the Ninth Circuit in this case, reported at 685 F.2d 1182.

STATEMENT OF THE CASE

This action arises out of a trustee's sale of a convalescent hospital held over nine years ago following the failure of the partnership-borrower to make required installment

loan payments on a loan insured by the Federal Housing Administration ("FHA").

On February 2, 1971, Coastside Convalescent Hospital ("Coastside") obtained a loan from Bankers Mortgage Company of California ("Bankers") to fund renovation work on the hospital. The loan was secured by a deed of trust encumbering the property, and repayment of the loan was guaranteed by FHA. Roberts-Pacific, Inc., a general contractor, became a partner in Coastside and itself began performing the desired renovation work.

Petitioner Luisa Lehner, claiming to be either a general partner of Coastside or its successor in interest, alleged below that either under the original loan agreement or pursuant to oral promises made by an employee of FHA, Fred Soviero, FHA owed a contractual duty to petitioner to ensure that the contractor—the petitioner's partner—would complete the work to be done in a proper fashion. Petitioner further alleged that Soviero induced her to execute a Notice of Completion declaring that construction work had been satisfactorily completed on January 18, 1972 (which was not the case) by representing that the Notice of Completion would result in the release to the contractor of additional funds which would be sufficient to pay the contractor to complete the project, including correction of construction defects, and that if petitioner executed the Notice of Completion, FHA would supervise the contractor and require him to complete the project. Petitioner contended that FHA breached this promise.

Petitioner herself had been in difficulty with the California Department of Health for mistreating patients and administering poor nursing care for some time. Medi-Cal

suspended Coastside from patient care benefits on October 16, 1972. As early as March, 1973, the loan was overdue, and the delinquent amount rose to over $40,000 by July, 1973. In August, 1973, a ninety-two page judgment was filed against Coastside for defects and noncompliance with the California Health Code, resulting in a state court order that the building be evacuated and the hospital closed.

Following Coastside's default on the loan, FHA compensated Bankers for its loss, and the beneficial interest on the deed of trust was then assigned to the Secretary of the Department of Housing and Urban Development ("HUD"). On October 4, 1973, the California Department of Health informed HUD that petitioner had been decertified and never would be recertified as a convalescent hospital operator. Finally, on February 5, 1974, the contractor refused to continue work on the project, citing a broken hot water line and the lack of heating in the building.

During 1973 and the bulk of 1974, HUD refrained from foreclosing on the property. Petitioner participated in meetings on a number of occasions with various representatives of FHA and HUD, sometimes represented by counsel, during which she explained her problems and her claims concerning Soviero and sought reinstatement of the loan. She had full knowledge of the impending foreclosure proceedings during this period, and a full opportunity to present her claims during these meetings.

These contacts included the following:[1]

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[1]A factual dispute exists among the parties as to when the foreclosure sale occurred. Respondents contend the sale occurred on November 15, 1974, and the listing of meetings above assumes the

1. A telephone conversation in December, 1973, between petitioner and one Jerplen Keys with a representative of the HUD loan management division in Washington, D.C., believed to be Anthony de Julio, during which the parties discussed construction defects in the hospital, the possibility of foreclosure, and a plan under which the property would be returned to petitioner, who would lease it to Ms. Keys.

2. A subsequent meeting or conversation with Mr. Benson of the FHA Regional Office in San Francisco, California, during which construction defects and problems with the loan were further discussed.

3. A meeting in August, 1974, between petitioner, her attorney and Mr. Benson and Mr. Ohler of the FHA Regional Counsel's Office, during which petitioner's claims in the matter, the construction defects, and petitioner's proposal for a settlement of the matter were all discussed.

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validity of this date. Petitioner contends that the sale occurred in September, 1976. Court of Appeals Opinion, Appendix A to Petition, at A-4. Assuming *petitioner's* claim to be accurate, the following additional contacts occurred before the sale:

8. A letter sent by petitioner on July 25, 1975 to Mr. Smith, Regional Inspector General at HUD, requesting reinstatement.

9. A letter sent by petitioner's attorney on September 16, 1976 to Mr. Harman, of the Regional Administration for Housing Management requesting a continuation of the sale, and discussing the conduct of Soviero.

10. The filing of this action in the district court to enjoin the sale on September 21, 1976.

11. An application to the district court for a temporary restraining order against the sale, made and denied on September 21, 1976.

Further, petitioner contends that she had other contacts with FHA and HUD, which she cannot recall, but that these defendants should have records of the "many letters, phone calls, meetings and negotiations." Petition, page 19.

4. A meeting with Mr. Benson of HUD on August 29, 1974, requesting him to "stop foreclosure".

5. A discussion with Mr. Lipolf of the Loan Management Branch of HUD on September 4, 1974, concerning the delinquency in the loan, and possible reinstatement.

6. A conversation between petitioner's attorney and FHA representatives on September 25, 1974, during which her attorney requested a delay of foreclosure proceedings.

7. Receipt of a letter from HUD on October 9, 1974, stating that the foreclosure sale would proceed on the scheduled date and would not be postponed.

After a delay of over a year, during which the hospital had been vacant by court order, a trustee's sale was finally held under the deed of trust on November 15, 1974. As of that time, the default on the loan had reached over $70,000. HUD purchased the property.

HUD then conducted an extensive appraisal of the property and determined that as of June, 1975, the fair market value of the property was only $208,000; the property had deteriorated during its abandonment. Subsequently, HUD decided to sell the property and published notice of the pending resale on a nationwide basis, eventually offering the property for sale on August 25, 1976 in "as-is" condition.

On September 21, 1976, HUD entered into a contract with respondent House of Affirmation, Inc., a non-profit, charitable organization ("House of Affirmation"), by which House of Affirmation agreed to purchase the property for the sum of $165,000, the highest price offered. House of Affirmation consummated the contract, and rehabilitated and occupied the property.

On the same day, September 21, 1976, petitioner filed her original complaint in this action against a variety of federal officials and employees. House of Affirmation was named as a defendant for the first time in the Amended Complaint, filed on March 17, 1978. Defendants' eventual motions to dismiss the Amended Complaint and then the Second Amended Complaint were granted.

On May 16, 1979, petitioner filed her Amendment to the Second Amended Complaint—her fourth pleading in the action. Defendants' motions to dismiss were granted as to its first eight causes of action.[2] Ultimately, defendants moved for summary judgment on the last two causes of action, which was granted by the district court on March 28, 1980.

Petitioner did not raise the claim at the trial level that use of the statutory procedure provided under California law for nonjudicial foreclosure violated the Fifth Amendment. Rather, at all times petitioner's claim was that the specific procedures followed in this case by HUD concerning the foreclosure—*whatever their source*—failed to comply with the requirements of due process. In fact, in the district court petitioner took the position that the foreclosure should be invalidated for the reason that it did *not* comply with the statutory requirements set forth for nonjudicial foreclosure under California law.

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[2]Petitioner sought relief below against House of Affirmation based upon her Fifth Amendment claims in both the Eighth Cause of Action (dismissed on the motion to dismiss) and the Tenth Cause of Action (dismissed following summary judgment), which incorporated those allegations, and sought to quiet title to the property.

Similarly, on appeal before the Court of Appeals for the Ninth Circuit, petitioner did not raise the issue of the constitutionality of use of the California statute, arguing rather that the specific procedures used were improper.[3] The Ninth Circuit affirmed the judgment of the district court, finding that the procedures employed by HUD, based on the facts of this case, did comply with due process. The Ninth Circuit did not examine whether use of the California nonjudicial foreclosure statute was constitutional, properly noting that:

> Because Lehner does not dispute that the procedure prescribed by California law provides minimal due process, we need not evaluate its constitutionality.

REASONS FOR DENYING THE WRIT

1. Neither the Decision Below Nor the Record Raises the Question Presented in the Petition

The sole question presented in the petition is whether the use of the statutory procedures governing nonjudicial foreclosure under California law violates the Fifth Amendment, where the federal government is a mortgagee. But the Ninth Circuit did not decide this question in this proceeding, nor was it raised before the district court.

As noted above, petitioner's claim in each of her four pleadings before the district court was that the specific procedures followed by HUD in the foreclosure—whatever their source—violated due process in that she was denied

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[3]Significantly, the California statutes concerning nonjudicial foreclosure, Civil Code sections 2924, *et seq.* were not even cited—much less analyzed—in the sections of petitioner's opening or reply briefs dealing with the Fifth Amendment claim. The only citation to these statutes occurred in the sections where petitioner argued that the foreclosure procedures *violated* those statutes.

adequate notice and an opportunity for a hearing.[4] Her pleadings thus raised the issue of due process *as applied* to the facts of this particular case. Petitioner has never claimed that HUD used the procedures created by the California nonjudicial foreclosure statutes. In fact, her claim before the district court and Ninth Circuit was that HUD had *not* followed those procedures. At no time before the district court did petitioner raise the question which she presents to this Court—whether use of the California nonjudicial foreclosure statutes is constitutional.[5]

Similarly, in her briefs before the Court of Appeals for the Ninth Circuit, petitioner argued that—based upon the facts of this case—she had been denied adequate notice and a hearing. Her briefs did not even cite any of the California statutes dealing with nonjudicial foreclosure, Civil Code Sections 2924 *et seq.*, much less raise the issue that their use was unconstitutional. Accordingly, the Ninth

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[4]The *only* pleadings raising the Fifth Amendment issue are quoted in the Petition at pages 6-7. The language of the original complaint at page 6 was continued in the Amended Complaint and Second Amended Complaint. The claim was slightly reworded in the Amendment to the Second Amended Complaint, quoted at pages 6-7.

Although admitting that she was represented by counsel in at least some of her dealings with FHA and HUD before the trustee's sale, petitioner also alleged below that she was deprived of a right to counsel in the process. This claim was not raised before the Ninth Circuit, however.

[5]The record below reflects substantial disagreement as to what procedures were used. Petitioner contended that the California statutes were not followed. It is undisputed, however, that petitioner had many meetings and conversations with government representatives concerning foreclosure which are not mandated by these statutes, as discussed in the Statement of the Case. This is thus not a case in which only the statutory procedures were followed (if at all), and does not present a proper vehicle for a Supreme Court analysis of the California system.

Circuit did not examine whether these statutes are constitutional, and noted this fact in its opinion.

2. A Ruling on the Question Presented in the Petition Would Not Change the Result Below

Even assuming *arguendo* that the question presented in the petition was considered indirectly below, a ruling on that question would not change the result below.

The question the petition presents is whether use of the California nonjudicial foreclosure statutes by the federal government violates due process. By definition, nonjudicial foreclosure is a procedure which does *not* require a hearing, in contrast with judicial foreclosure. Thus, alternatively viewed, petitioner's argument boils down to a claim that due process requires a hearing before the federal government may foreclose.

But the Ninth Circuit opinion effectively *agrees* with this position:

> When the Government acts as mortgagee, clearly the mortgagor has a right to notice and a hearing prior to the sale. (Court of Appeals Opinion, Appendix A to Petition at A-11)

A determination by this Court that due process mandates notice and a hearing would thus be an empty echo of the Ninth Circuit decision. It would serve no useful end.

The issue before the Ninth Circuit was not whether notice and a hearing are required by due process in the abstract. Rather, the issue was whether the notice and hearing which petitioner did receive in fact met due process standards. This issue—which petitioner has not raised here—was correctly decided.

3. The Action Was Correctly Decided by the Ninth Circuit

The only due process question which petitioner could raise before this Court is whether, in fact, she was accorded adequate notice and an opportunity for hearing. The Ninth Circuit properly determined that the procedures used by HUD met the requirements of due process.

A. Notice

The opinion of the Ninth Circuit examines plaintiff's actual knowledge of the impending sale for over a year in advance, and the many meetings and conversations among governmental officials, petitioner and her attorney. It concludes that she in fact received notice which apprised her fully of the foreclosure sale and the options available to her, even if not necessarily in writing.

This finding comports with the basic purpose of due process—to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. *Mullane v. Central Hanover Bank and Trust Company*, 339 U.S. 306 (1950). This result similarly reflects the holdings of this Court that the kind of notice which is required by due process will vary with circumstances and conditions, and cannot be limited by any rigid formula. *Walker v. City of Hutchinson*, 352 U.S. 112, 115 (1956); *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972).

B. Hearing

The Constitution requires that a debtor have an opportunity for a hearing in a "meaningful time and in a meaningful manner" in order to meet the requirements of due process. *Boddie v. Connecticut*, 401 U.S. 371, 378 (1971). Due process allows variances in the form of the hearing which is appropriate to the nature of the case involved,

depending on the importance of the interests involved. *Fuentes v. Shevin*, 407 U.S. 67 (1972); *Mathews v. Eldridge*, 424 U.S. 319, 334-335 (1976).

In *Kremer v. Chemical Construction Corp.*, 102 S.Ct. 1883, 1898 (1982), one of the most recent opinions examining the same issue, this Court reiterated the rule that no single model of procedural fairness, let alone a particular form of procedure, is dictated by the due process clause:

> The very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation.

Here, petitioner had a fully adequate hearing. Represented by counsel, she participated in a series of informal hearings with government representatives over a period of at least eleven months prior to the foreclosure sale, described in detail above in the Statement of the Case. Before the district court and the Ninth Circuit, respondents successfully contended that these many conferences constituted a sufficient hearing under the flexible standards of due process.

4. The Narrow, Highly Factual Issue in This Action Does Not Merit Examination by This Court

This action does not present a significant constitutional question whose decision would resolve a conflict in decisions among the circuits or in which there is substantial national interest. Rather, the only narrow issue which could be considered by the Court would be whether the trial court acted within its discretion following motions to dismiss and for summary judgment in concluding that the procedures followed by HUD complied with due process on the facts of this case. This highly factual determination can have little bearing on future litigants or on the public as a whole.

There is no substantial conflict among the opinions of various circuits as to how the Fifth Amendment should be applied to foreclosure proceedings when the federal government is a mortgagee. Each has recognized the fundamental precept laid down by this Court that due process contemplates flexible procedures, attuned to the nature of the particular case involved. *Morrissey v. Brewer, supra; Kremer v. Chemical Construction Corp., supra.*

Thus, for example, in *Hoffman v. Department of Housing and Urban Development,* 519 F.2d 1160 (5th Cir. 1975), the Court assumed that due process would require allowing the homeowners there an opportunity to be heard before foreclosure, but found that they had been allowed all the due process proper under the circumstances, since they had been offered an opportunity to explain their failure to make required payments, but had not accepted the opportunity. Similarly, *Fitzgerald v. Cleland,* 498 F.Supp. 341 (D.Me. 1980) found that the plaintiff there—a Lieutenant Colonel in the National Guard who had substantial experience in real estate—had received sufficient opportunity for a hearing based upon his contacts with the Veterans' Administration and the bank involved, recognizing that the requirements of due process vary depending upon the circumstances of each case. The other decisions in the area, dealing with elderly and highly unsophisticated parties who generally had not received any notice prior to the foreclosure sale, have accordingly imposed more significant hearing requirements based upon the facts of those individual cases. See *United States v. White,* 429 F.Supp. 1245 (N.D. Miss. 1977); *United States v. Ricker,* 417 F.Supp. 133 (D. Me. 1976).

These decisions reflect the fundamental rule that the requirements of due process vary depending upon the circumstances of each case. Here petitioner is a businesswoman, who was represented by counsel during efforts to avoid foreclosure over a period of a year prior to the sale, and who participated in a number of meetings and discussions with federal government employees during which she and her attorney explained her problems. The decision of the Ninth Circuit that she was afforded sufficient due process on these facts falls well within the parameters for hearing requirements suggested by other circuits.

The lack of any significant conflict among the circuits and the narrow scope of the factual issues involved here combine to create a question of interest only to the litigants in this action.

CONCLUSION

For these reasons, the petition for writ of certiorari should be denied.

Dated: February 18, 1983.

Respectfully submitted,

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